

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SOKOLOW, et al., : 04-CV-397 (GBD)
Plaintiffs, : April 24, 2013
v. :
PALESTINE LIBERATION ORGANIZATION, et al., : 500 Pearl Street
Defendants. : New York, New York

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY DISPUTES
BEFORE THE HONORABLE RONALD L. ELLIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Good afternoon. This is Judge Ellis.
2 Can I have your appearances beginning with the plaintiffs?

3 MR. TOLCHIN: Good afternoon, Your Honor. This is
4 Robert Tolchin for the plaintiff and with me on the line is
5 Rachel Weiser.

6 MR. HILL: Good afternoon, Your Honor. Brian Hill
7 and Mark Roshan for the defendants.

8 THE COURT: This is a conference in Sokolow v.
9 Palestine Liberation Organization, et al., 04-CV-397. It is
10 Wednesday, April 24th at approximately 2:30 p.m.

11 There are a number of issues raised by the parties
12 concerning expert discovery and I have received -- I have
13 received the parties submissions and I assume nobody tried to
14 send me anything in the last 24 hours.

15 MR. HILL: Nothing from us, Your Honor.

16 THE COURT: Let me give you some overall
17 considerations so that the parties would understand the
18 context of the rulings. First of all, ruling on the experts
19 and discovery in general takes place in the context in which
20 the parties do not have a set trial date. Obviously the rules
21 are designed so that all discovery is completed sufficiently
22 in advance of discovery including -- in advance of the trial
23 including expert discovery. While it is true that the Court
24 has continued to set deadlines in an effort to get discovery
25 completed as expeditiously as possible it is also true that

1 the typical district judge in the district prefers to have the
2 discovery completed and done on the merits as opposed to based
3 on procedural issues.

4 With that in mind, let me address the issues as I
5 have understood them raised by the parties not in any
6 particular order but the first one in part because I think we
7 may have left off our last conversation with that concerns the
8 defendant's application to strike the Sudray [Ph.] expert
9 deposition, expert report pursuant to an October order that I
10 had directed the parties. I think I said in our last
11 conference I was somewhat disappointed that the issue that
12 caused the concern about the Sudray report specifically
13 Loustein's ability to function as a teacher given the
14 convictions that were on his record and I expressed in our
15 last conversation that I thought that I would have -- I
16 thought it would have been expected that the plaintiffs would
17 have conveyed that information to the expert.

18 Notwithstanding that, given the status that we have
19 here I don't see the -- any inherent prejudice in the redoing
20 of the report. I might say that, again, consistent with my
21 introductory remarks is that while I have endeavored to set
22 deadlines and they are true deadlines it's certainly my
23 expectation that the deadlines would not be an impediment to
24 granting extensions in a case where there's a significant
25 number of experts to be deposed and who's supposed to be

1 prepared.

2 One of the things that's obvious is that we're going
3 to have to adjust the deadlines that the parties have in order
4 to have discovery done reasonably and completely. So in that
5 context to the extent that the Sudray report is done and
6 redone I think we can do that without delaying the proceedings
7 in general.

8 Mr. Tolchin, if I understand the report correctly,
9 it should not -- the redoing of the report taking into account
10 this restriction should not cause -- should not take very
11 long. Have you talked with --

12 MR. TOLCHIN: It was done already, Your Honor.

13 THE COURT: Then you -- I guess that answers that
14 question. And you've resubmitted it -- have you resubmitted
15 it to the defendants?

16 MR. TOLCHIN: We did and we submitted a copy of it to
17 Your Honor also although I understand that with the flurry of
18 papers I'm sure it's -- you may not have realized.

19 THE COURT: All right. Then you have my permission
20 to resubmit to defendants. To the extent that you have we'll
21 consider it submitted to the defendants.

22 MR. TOLCHIN: Thank you, Your Honor.

23 THE COURT: There were a number of applications
24 concerning the plaintiff's liability and defendant's expert.
25 Let me try to categorize them. First of all, there were

1 complaints about the failure of the experts to present
2 detailed and complete calculations, specifically the Weinstein
3 and Sudray reports. It is -- with respect to those reports, I
4 understood the plaintiff's position to have been that the
5 defendants had not pointed out any different number to such
6 that it would require the plaintiffs to respond. That's not
7 the standard. I have looked at the reports and what I expect
8 an expert report to do is to give specific detailed
9 calculations that can be followed by the person who's reading
10 the report with numbers and at least one example so that you
11 know not only the parameters that were used but the actual
12 numbers that were selected and the calculations that followed
13 the numbers.

14 So the reports that I saw did not conform to that
15 requirement. Mr. Tolchin, you -- have you been in contact
16 with your experts about those reports?

17 MR. TOLCHIN: Let me answer like this. First of all,
18 me personally no. I will defer on this issue to Rachel Weiser
19 who's on the phone with us who is the attorney who is handling
20 the nuts and bolts of this but --

21 THE COURT: Before you continue, when I say you
22 either side. I obviously don't mean the individual particular
23 attorney. When I say you I --

24 MR. TOLCHIN: Okay. I appreciate that. So let me
25 say one thing that I think I can contribute and then I will

1 defer to Rachel. Our position with -- Your Honor stated what
2 our position was and I wanted to correct it. I don't think
3 that you stated our position accurately. Just to be clear
4 what we said is that we are willing to work with the defendant
5 and if there is anything that the defendant brings to our
6 attention which the defendant believes is not clear or is
7 missing or needs to be clarified or supplemented we are
8 willing to do that. All we asked is that they should tell us
9 we don't understand how this calculation -- how this
10 particular calculation was done and then we'll know exactly
11 what we need to answer and go to the expert and get it
12 answered.

13 What we were having frustration with was just being
14 told your report is deficient and not -- without a specific
15 about what it was that they thought needed to be clarified but
16 with that being said, Rachel -- are you there, Rachel?

17 MS. WEISER: Yes, I'm here. Your Honor, I have
18 reached out to the experts. I assume that you're talking
19 about the economic reports.

20 THE COURT: That's correct.

21 MS. WEISER: Okay. I have reached out to the
22 experts. I have not yet spoken to them. I am scheduled to
23 speak to one of them tomorrow and I'm waiting to hear back
24 from the other one. I did ask defense counsel to give me some
25 more specifics about what it is [inaudible] calculation that

1 they have issue with. We did discuss it in our meet and
2 confer but I actually I think I need to get some more
3 information from Brian and while he did provide to me a follow
4 up email to our meet and confer he didn't include any
5 information in that email about calculations that were still
6 needed. So I'm not sure what he still needs but the answer in
7 a nutshell, Judge, is I will both speak to Brian and confer
8 with our experts and get whatever is needed.

9 MR. HILL: Your Honor, if I could be heard on this
10 briefly. The issue here is whose responsibility it is to
11 comply with the rule. I don't think I should be required to
12 tell the plaintiffs what's wrong with their reports when Your
13 Honor has looked at them and you can't follow the calculations
14 either. I'm happy to do whatever Your Honor wants in the
15 spirit of working to accommodate counsel's concerns but it's
16 their job to give us a report that complies with the rule and
17 details the bases for the opinions and that's not been done
18 here. So I don't think I should bear the burden of going
19 through all these reports and preparing a detailed list of
20 where their expert didn't do what the rule requires. I think
21 if Your Honor is going to give them another chance they ought
22 to get a deadline to do it and they ought to produce them and
23 if they don't that ought to be it. We shouldn't have to keep
24 going through this process of me improving their expert
25 reports which they didn't comply with the rule in the first

1 place.

2 THE COURT: Let -- this is for Ms. Weiser who's going
3 to be talking with the experts. For example, I'm looking at
4 the expert report opinion with respect to Shawl Mandelcorn.
5 Within the report it talks about methodology. It lists what
6 appear to be seven items listed A through G. I don't know if
7 you have it there but -- or if you're familiar with it to know
8 what I'm talking about. Actually --

9 MS. WEISER: I don't have it in front of me, Judge,
10 but --

11 THE COURT: What the expert said is the calculation
12 consists of nine steps applied as follows. Then he says A)
13 determination of the valuation date. Now, with respect to
14 that there's a date selected which is mid 2013. That seems
15 self-explanatory. I think even B and C might be self-
16 explanatory although I'm not exactly sure but it says, for
17 example, life expectancy and it says that Mandelcorn's life
18 expectancy is 82.1 years and reference -- see Reference 2. I
19 don't know that it gives any information -- well, I'm not sure
20 whether defendants are in any better position than I am but I
21 know that if this report is submitted to the district judge,
22 the district judge is going to want to know how did one
23 determine that his life expectancy was 82.1 and the beginning
24 stages of that is at least we should know how old he is and
25 what table was used and where in the table it indicates that

1 his life expectancy is 82.1.

2 You have estimation of retirement age and it says
3 the customary retirement age of 67 according to Israel law
4 retirement age 2004. I assume that -- that's again to
5 Reference 3. That -- assuming that that reference is just a
6 table then that should be something which you could walk the
7 defendants through.

8 The next item is where I started to have problems
9 that were more serious and it talks about estimation of income
10 after retirement, and it states the income after retirement
11 was determined based on rates prescribed the mandatory pension
12 law in Israel that requires every employee to contribute to a
13 provident fund for their employees. The deposits include an
14 old age pension and coverage in case of disability and death.
15 Nowhere is there a number that even tells me any of these,
16 what numbers are gotten by the expert, how they're fit into a
17 formula, what the law says. So at this point I have no idea
18 what was going into the formula.

19 MR. HILL: Your Honor, just for the record. Those
20 are the same -- actually two of the same exact concerns I
21 raised with the plaintiffs on Friday.

22 If I could, Your Honor, there is one related issue
23 which is this Reference 3 which Your Honor has just referenced
24 is the source of some of this information. This is entirely
25 in Hebrew and we think this is an independent reason why the

1 report is not in compliance with the rule because it's not
2 transparent to an English reader what the source of the
3 information is not only from the text itself, not correlating
4 the reference, but the reference itself you can't verify the
5 assertion in the text. So that's one of the reasons we asked
6 that it be stricken or alternatively at the very least that we
7 get an English version of this material that's appended to the
8 report.

9 THE COURT: Okay.

10 MR. TOLCHIN: You're talking about the life
11 expectancy, the Israeli life expectancy tables published by
12 the Israeli government?

13 MR. HILL: No. This is a law, Mr. Tolchin. This is
14 Exhibit 3. It's the --

15 MR. TOLCHIN: The Israeli fact sheet.

16 THE COURT: Mr. Tolchin, do you have a question for
17 me there?

18 MR. TOLCHIN: I'm just trying to clarify what
19 document Mr. Hill was referring to.

20 THE COURT: Well, it says Reference 3 and I admit I
21 was unable to read it. So in this instance it's also a
22 question of what are going to be the plaintiffs or anybody's
23 obligation with respect to any translation or the production
24 of any exhibits that accompany the report. And in this case
25 this suffers from two problems. One is, obviously I could not

1 read the exhibit and then I don't know even what they would
2 have -- even if the exhibit were in English I would still
3 expect to have more than a reference to an exhibit. I'd like
4 to know what would the result of reference to the exhibits so
5 I could know what number they came up with and how they came
6 up with it.

7 But at the very least I think this is one instance
8 in which I agree with Mr. Hill that if you're going to present
9 an exhibit it needs to be something that can be followed by
10 the person who's reviewing the expert's work.

11 MR. TOLCHIN: We would -- we think the issue is more
12 complicated than that, Your Honor, and we would appreciate an
13 opportunity to present Your Honor with cases and authorities
14 but in general experts -- experts can rely on many things and
15 the things that the experts rely on are not necessarily
16 exhibits for the jury. If it were being presented to the jury
17 I would have no doubt that it would need to be translated but
18 when an expert opining about a person's work life expectancy
19 or pension benefits available in Israel refers to a primary
20 source which is an Israeli statute or an Israeli life
21 expectancy table it's natural that those things will be in
22 Hebrew. I would presume that the defendant's expert opining
23 on the same things will refer to the same sources and --

24 THE COURT: Well --

25 MR. TOLCHIN: -- the trans --

1 THE COURT: -- first of all, you're making
2 assumptions that I'm not making. First of all, I'm not
3 assuming that the defendants would necessarily do anything in
4 terms of their experts. They might not disagree with your
5 experts on life expectancy.

6 MR. HILL: Your Honor, the problem is --

7 MR. TOLCHIN: When we had this issue when we all
8 appeared in front of Judge Daniels this past summer -- I wish
9 I had the transcript right here but this exact issue came up
10 and Judge Daniels -- I could dig it out and submit it to Your
11 Honor but Judge Daniels said very clearly that experts
12 [inaudible] and a lot of it is going to be in foreign
13 languages and if there's a problem about reading it people
14 need to get a lawyer who reads it or get somebody who can read
15 it. If you can't --

16 THE COURT: If Judge Daniels has made general
17 statements -- I don't disagree with the general statement that
18 sometimes if there are references to foreign things you may
19 need to get somebody to do it. I'm talking about this very
20 specific thing. This is not a reference. This is a reliance.
21 This is not a situation where a lawyer might say or an expert
22 would be asked well, how did you form that opinion and they
23 could say well, my general reading of Robert Conrad or
24 something in Russian or whatever it is and that's the
25 background material that I read. But if you're going to rely

1 on a table that's different in kind, and if you think that --
2 if you think that Judge --

3 MR. TOLCHIN: This is more on the lines of if you
4 rely on the -- if the expert says that taxes will have to be
5 withheld pursuant to the Internal Revenue Code you wouldn't
6 expect that you'd have to translate the entire Internal
7 Revenue Code.

8 THE COURT: And we're not asking anybody to do the
9 entire anything. We're just asking for a table. If you're
10 relying -- if you're referring as opposed to relying, and
11 that's a difference -- I mean this is not someone who's saying
12 that I have general background and I've read it and I'm
13 familiar with it because -- you could have -- you could have a
14 scientist for example and a scientist who does a lot of
15 scientific information is in different languages and they
16 could say I've read information about gastroenteritis affects
17 somebody's mental state and I read it because there was a
18 Russian report on it. Well, that's fine. You could do that
19 and I would say well, if he's done that and he's read that in
20 Russian that's good because he can read it in Russian because
21 a lot of the information is in Russian.

22 But if he has a table such as this in which he says
23 I looked at this table and here's what I got from this table,
24 that's different. If you think Judge Daniels ruled on that
25 then you have two choices. One, you can rely on the fact that

1 you think Judge Daniels relied on it and you can do whatever
2 you think is appropriate or you can go ahead and produce the
3 translation because I tell you if you don't produce the
4 translation I'm going to find that you have not -- your expert
5 report is inadequate. Then you can find out if Judge Daniels
6 actually ruled in your favor.

7 MS. WEISER: Your Honor, this is Rachel if I may.
8 I'm not sure that we have a major issue with this translating
9 the tables. I don't think that is going to be difficult but I
10 think there's a broader problem here because the defendants
11 are taking a position that everything that our experts relied
12 upon in a foreign language has to be translated for them and
13 that is contrary to the position they've taken across the
14 board in this case beforehand and everything they've ever
15 produced to us. And we don't have translations and we're
16 talking about hundreds of pages and --

17 THE COURT: And now you're getting ahead of yourself.

18 MS. WEISER: I don't --

19 THE COURT: This issue now and -- as I said, with
20 respect to this issue, if you're talking about referring to a
21 table this is not general reliance. This is referring to a
22 table and as far as that is concerned you can't just say I
23 refer to this -- I refer to a table and it's in a foreign
24 language, if you want it, go get it translated. That's not
25 going to work with respect to tables.

1 MR. TOLCHIN: Okay.

2 THE COURT: Who said okay?

3 MR. TOLCHIN: That was Bob Tolchin.

4 THE COURT: Understand that with respect to these
5 calculations I think it's important, and I think this would be
6 important whether or not it -- as I said, it doesn't matter to
7 me that -- well, over and above the question of whether or not
8 the tables are in a foreign language, with respect to
9 calculations the party who has received the report ought to
10 know what numbers went into the calculation and where -- and
11 where they were derived from. In this case the report doesn't
12 even say what number was derived. It just refers to the
13 table. So it's deficient on a more basic level of what the
14 translation would say. So with respect to --

15 MS. WEISER: Your Honor, [inaudible].

16 THE COURT: So with respect to that, I know that with
17 respect to Weinstein and Sudray there were problems.

18 Let me move on to some of the general issues so that
19 we can try to have this done in some reasonable amount of
20 time.

21 MR. HILL: Your Honor, I don't want to detain us but
22 someone was typing and I may have missed something that you
23 said. Have you ruled that the plaintiffs are going to have to
24 produce new reports for Mr. Sudray and Mr. Weinstein?

25 MR. TOLCHIN: I don't know if they have to be new

1 reports over all but the Weinstein and Sudray reports need to
2 have translations of any tables that are referred to and the
3 actual numbers that are derived from the table. That is, it's
4 not enough to just translate the tables but to actually
5 indicate from the table which numbers were selected.

6 MR. HILL: Thank you, Your Honor.

7 MR. TOLCHIN: One issue is translating whatever was
8 in Hebrew on the table but the other issue is have the experts
9 specify [inaudible] went to the 49 year old line and came
10 across to column C and that's the number I used.

11 THE COURT: Correct. Now, with respect to the
12 footnotes that are referenced in the various reports, did the
13 parties make any progress on their own?

14 MR. HILL: Yes, Your Honor. I can give you an update
15 on that. So we have conferred and I have now given the
16 plaintiffs lists for all five of the reports about which we
17 complained in my letter of April 17th. We have at the
18 plaintiff's request also gone over our lists to make sure we
19 have -- we cannot in fact find these materials and as of right
20 now of the 762 footnotes in these five reports there are 251
21 footnotes for which we cannot find the material that the
22 plaintiffs have referenced. They're not evenly distributed so
23 I don't want the Court to conclude that it's 50 in each one of
24 them.

25 For Mr. Atticott we're down to one document where we

1 can't find the footnote. For Mr. Levitt we're down to 13
2 documents but for the other three it's still a very
3 substantial number of documents. For Mr. Karsh we cannot find
4 98 out of the 110 sources that are included in its footnotes.
5 For Mr. Shockhead we can't find 62 out of 177 footnoted
6 sources and for Mr. Shrexnell we can't find 77 out of 329
7 sources.

8 As Your Honor knows, our position is that this is
9 material that was required to be either produced, the
10 documents had to be produced or at the very least we had to
11 have references that we could find the documents for on the
12 day the reports were due and that therefore they're not in
13 compliance with Rule 26 and our request is that Your Honor
14 exclude the witnesses for that reason.

15 THE COURT: Let me first say I'm glad you made some
16 progress but also state clearly what my position is with
17 respect to this. I think the latter position that Mr. Hill
18 took is closer to where I am. That is, to the extent that
19 there are footnotes or references to publicly available
20 information, for example if somebody referenced a *Law Review*
21 article or an article in the *New York Times* or the *New York*
22 *Law Journal* and said they relied on that, to the extent that
23 it's available and the other party can reference it either
24 online or otherwise that seems to me to be fine because I
25 wouldn't expect any more than if somebody were referring to

1 cases for someone to be required to put copies of it. But to
2 the extent that they are not readily available and the other
3 side cannot and specifically says to their opponent you've got
4 these references, we cannot find them, then it is incumbent
5 upon the expert and the party who retained that expert to make
6 sure that the other party has copies of the referenced
7 material. That is my position.

8 Now, I understand that Mr. Hill does want these
9 things stricken but as I said I think when the issue is first
10 presented as to whether or not information in footnotes need
11 to be presented I don't think as a general rule that it's
12 necessary but obviously I had no idea how difficult it might
13 be to find some of the sources or whether or not they were
14 readily available. But before I would strike anybody I would
15 certainly give the party whose expert it is an opportunity to
16 see how much of this would be remedied and then I would make a
17 ruling in terms of the total context of the circumstances.

18 MR. TOLCHIN: Your Honor, this is Bob Tolchin. We
19 have been working towards that goal. We've made it clear to
20 the defendants that we will work with them to help them find
21 every one of the sources.

22 By the way, one of the reasons why the list of
23 sources that they couldn't find when found was that some of
24 the citations that they had said were no good actually turned
25 out to be good. There was nothing wrong with them. We found

1 them readily and we are -- we -- I should say Rachel is hot on
2 the trail of the rest and it's just a question of working with
3 the experts, making them go back to their -- to whatever their
4 sources are and pull out those articles or links or cites or
5 whatever they are so that we can square them away but it's not
6 something that can be done in a minute because of the volume
7 but we are working on it assiduously.

8 Somebody seems -- there seems to be somebody with
9 cross talk on this line.

10 THE COURT: There's some garbling on the line. Is
11 that any of the attorneys or just -

12 MR. TOLCHIN: Mr. Hill, are you still there?

13 MR. HILL: I'm still here, Your Honor, and I can hear
14 you.

15 MS. WEISER: I'm here.

16 THE COURT: I think some feed --

17 MR. TOLCHIN: I don't know what that was.

18 THE COURT: I think that's feedback from one of the
19 phones.

20 MR. TOLCHIN: That could be. So I hope you heard --
21 I hope everything I said came through. We are working
22 assiduously to remedy -- what is that? We're working
23 assiduously to remedy the defects.

24 THE COURT: Actually I think, Mr. Tolchin, it's your
25 actual feedback that's being -- it's coming -- after you talk

1 it just -- it does a delay and then there's the feedback.

2 MR. TOLCHIN: I think I'm being persecuted by the
3 phone company.

4 THE COURT: So you understand what it is that I
5 require in order for compliance. At the end we'll have to
6 total all of this up.

7 But with respect to documents -- to some extent
8 the -- hold on a second.

9 [Pause in proceedings.]

10 THE COURT: I'm back. I'm sorry about that. Is
11 everybody still there?

12 MR. HILL: The defendants are here, Your Honor.

13 MR. TOLCHIN: Yes, Your Honor.

14 MS. WEISER: Yes.

15 THE COURT: Okay. Now I think we've come to the
16 issue that Ms. Weiser wanted to raise concerning documents
17 that are in Hebrew. If I understand correctly the assertion
18 by the plaintiffs is that they do not have translations.

19 MR. TOLCHIN: That's correct. Our experts who worked
20 with documents in foreign languages worked with them directly
21 in the original language.

22 MR. HILL: Your Honor, this is Brian Hill. Could I
23 be heard very briefly on this particularly with respect to Mr.
24 Kaufman because I think there is a data point Your Honor may
25 not have because I spared actually sending you the appendices

1 to his report.

2 Mr. Kaufman is the principal offender in -- with
3 respect to this particular issue. In his report on Page 7 he
4 says "Each case corresponds to an annex contained in the table
5 below and the materials made available to me are appended to
6 my opinion as an integral part thereof." Then he lists on the
7 pages that follow 7, 8 and 9, 21 appendices pertaining to 21
8 individuals. I had a hard copy set of these appendices made
9 so I could work with them. I'm looking at them right now in a
10 box in my conference room. They consist of four three-inch
11 binders of material that are double sided. So this is well in
12 excess of 3,000 and perhaps 4,000 pages of appendices that Mr.
13 Kaufman has indicated are an integral part of his opinion.
14 Only 23 pages of those three or 4,000 pages of material are in
15 English.

16 It is our position that this does not comply with
17 the requirement of Rule 26 because I cannot, and I didn't send
18 them to you, but you cannot read these materials that the
19 expert has said are an integral part of his opinion.
20 Moreover, the way he's using the materials is he's reviewing
21 them and then he's opining that the documents, these
22 materials, these appendices indicate that these proceedings
23 comported with due process. It is impossible for us to test
24 that opinion without knowing what these integral documents in
25 the appendices say, and it's for that reason it is our

1 position that this does not conform with Rule 26 and that Mr.
2 Kaufman's testimony ought to be excluded.

3 MR. TOLCHIN: Your Honor, may I be heard?

4 THE COURT: Yes, go ahead.

5 MR. TOLCHIN: I'll -- again, I will say what I have
6 to say but also defer to Rachel if she has something to add.

7 The issue comes -- the issue arises because of
8 things that people have said or admitted or findings that have
9 been -- testimony that's been given in Israeli court
10 proceedings or findings that have been made by Israeli courts.
11 The documents referred to are court records of Israeli court
12 proceedings and the issue is whether the witness testifying or
13 the person charged and found guilty was afforded something
14 resembling due process rights so that the admission,
15 conviction, et cetera would be useable here.

16 So Mr. Kaufman refers to a document -- he's
17 referring to this proceeding and that proceeding. His report
18 is only the part that he wrote which is 100 percent in
19 English. He's referring to the primary source which is the
20 foundation as it were of his opinion. I think it comes
21 through clearly here that what Mr. Hill is asking is for us to
22 be compelled to translate thousands of pages of court records
23 when the issue that the opinion concerns is whether or not the
24 witness had due process rights.

25 And I know from my experience with another case

1 involving -- which also involves Mr. Hill they took the
2 opposite point of view and they have an Israeli lawyer who
3 comes as an expert to say why he thinks that there were no due
4 process rights or why there are defects in the process.

5 MR. HILL: Your Honor, if I can -- I'm sorry, go
6 ahead, Mr. Tolchin.

7 THE COURT: Actually, frankly, I've indulged both of
8 you because I know you wanted to speak but as to this issue
9 I'm still not sure frankly in weighing this issue in terms of
10 the burdens and benefits of it what it is that -- why this is
11 such an issue. Frankly, the fact that the expert gave summary
12 of the cases seem to me to be sufficient in order to get a
13 sense of what these -- the Hebrew documents were about. But
14 as to whether or not or not there's -- the only question I
15 asked is whether or not there were translations. It seems to
16 me that if the answer to that is there are no translations the
17 only question is given what the nature of the expert's opinion
18 and the burden to be placed on anyone in making translations
19 of this I don't see the benefit of having actual translations.

20 MR. HILL: Your Honor, if I could be heard briefly.
21 The disadvantage that this places me at is I can't assess this
22 witness' opinion. He's saying I've read thousands of pages of
23 documents and they comport with due process and as a lawyer
24 trying to prepare to cross-examine the witness or depose the
25 witness or test the opinion, I don't have any ability to do

1 that because the documents are not in English.

2 Your Honor makes the point that he purports to
3 summarize them but I don't know the accuracy of the summary
4 because I can't access the underlying material, and that's the
5 prejudice that the defendants are suffering here.

6 Let me just make one other point, Your Honor, which
7 again may to be clear given that you don't have the documents
8 but these are not documents that were produced to us
9 necessarily in discovery. We are in the process of trying to
10 correlate this massive collection of Hebrew language documents
11 with the plaintiff's documents production over the course of
12 discovery. But it is apparent to us from the work we've been
13 able to do so far which involves as Your Honor may appreciate
14 looking at a document that's in a foreign language and trying
15 to see if we have that same document which is also in a
16 foreign language which is very difficult to do. It's apparent
17 to us though many, many of these documents were not produced
18 to us in discovery.

19 So for the first time after the close of fact
20 discovery we've got a massive production of foreign language
21 documents. We've got a witness that says I've read them all
22 and they comport with due process and we're supposed to try
23 and respond to these opinions, and our position is it doesn't
24 adequately disclose the facts or data considered by the
25 witness in forming the opinions or frankly the basis or

1 reasons for the opinion because the nature of the expert's
2 report is I've read the file and it comports with due process.
3 Well, if we can't read the file we can't understand the basis
4 for his opinion.

5 THE COURT: Duly noted but my ruling stands.

6 The next broad issue that the parties raise concern
7 where and when the experts would be deposed. Let me give my
8 general considerations here. One, this is not an issue that's
9 going to be decided by reference to a particular case in the
10 past. Each of these experts and in fact any witness, the
11 question of where and when they will be deposed is a function
12 of reviewing and considering the circumstances of that
13 particular expert and the burden and benefits of them being
14 deposed in one place or another. It is certainly true that in
15 many cases witnesses are required to appear here in the
16 Southern District. It's also clear that I've had cases in
17 which none of the witnesses were required to appear in the
18 Southern District. I fear that the issue here is not whether
19 or not the parties can agree on the general proposition that
20 [inaudible] take depositions at a place and a time that is
21 efficient under the rules but that you can't agree on too much
22 of anything.

23 Now, with respect to these experts, the deficiency I
24 have here is that the parties seem to think that this is some
25 legal issue that if you just say okay, this is -- from the

1 plaintiff's point of view the individuals are outside of the
2 United States and it's hard to coordinate their schedules and
3 they have personal issues in general terms. Therefore, we
4 need to go where they are and the plaintiff seems to think
5 that the case was brought here in the Southern District and in
6 general you take the depositions here, end of story. Well,
7 it's just not that simple.

8 MR. TOLCHIN: That was the defendant's position. I
9 think you just misstated that it was the plaintiff's --

10 THE COURT: I should have said defendant's and vice-
11 versa.

12 MR. TOLCHIN: I think you said plaintiffs when you
13 meant defendants.

14 THE COURT: Did I say defendants when I meant
15 plaintiffs or did I just mention one --

16 MR. TOLCHIN: I don't think so. I don't think so. I
17 think it was only -- I think you only misspoke once but I
18 apologize for interrupting.

19 THE COURT: I assume everybody understood what I was
20 saying that one side is taking one position and the other is
21 taking another, and that it's just not that simple, Counsel,
22 and I'm sure you know that. If you really think that the
23 deposition ought to take place in one -- for each of these
24 witnesses you need to tell me why it ought to be for each of
25 these witnesses. For some of them maybe they should be taken

1 someplace else and for others they ought to be required to
2 come here but --

3 MR. HILL: Well, Your Honor, this is Brian Hill. I
4 can narrow the issue perhaps. With respect to the three
5 domestic experts they've identified which are Atticott, Levitt
6 and Sudray, the plaintiffs have agreed to produce them either
7 in New York or Washington. So we don't have an issue there.
8 With respect to one of the eight Israeli experts the
9 plaintiffs have identified, they've represented that Mr.
10 Shockhead's wife has a disease that prevents him from leaving
11 her. I take that to be a true representation and assuming
12 that it is true we would accommodate Mr. Shockhead's family
13 consideration by either taking him in Israel or taking him
14 remotely.

15 But with respect to the seven remaining Israeli
16 experts, the plaintiffs in our view have not offered any
17 reason why they can't come to New York to be deposed apart
18 from two of them allegedly having busy schedules, and it's our
19 position therefore that having chose to proceed in New York
20 the plaintiffs ought to be required to bring their experts to
21 New York to be deposed and the defendants ought not to incur
22 the cost of requiring their lawyers to travel to the Middle
23 East for what would be at least a week and possibly more of
24 these depositions.

25 THE COURT: I understood that to be a position

1 although I wouldn't dismiss out of hand the fact that experts
2 have busy schedules because we're trying to schedule all these
3 depositions. So that will be a consideration. For example,
4 I've had experts in medical cases who were surgeons and they
5 have a full range of surgeries scheduled and the question is
6 okay, how do we accommodate the surgery that's going to be
7 done, how are we going to limit the cost, how are we going to
8 do this in the shortest amount of time and still get all of
9 this -- take all these things into account, and it's not as
10 simple as -- it's not even simple to know which is going to
11 cost the most.

12 MR. TOLCHIN: Your Honor --

13 MS. WEISER: Your Honor --

14 MR. TOLCHIN: -- it's Bob Tolchin and Rachel also
15 wants to say something. I'm glad that you brought up the
16 issue about a busy surgeon. In our case, for example, one of
17 our experts is not a surgeon but a physician who has patients
18 who have to waits months for an appointment with him.

19 THE COURT: Okay. Before --

20 MR. TOLCHIN: In his case --

21 THE COURT: Before you continue, Mr. Tolchin, I want
22 it to be clear I'm not going to decide this based upon the ad
23 hoc arguments from any of you. What I want you to understand
24 and I want everybody to understand is the discussions you
25 should be having are all these things, the totality of the

1 circumstances. You should not -- and this is the way it's
2 going to go. If you have any -- if the plaintiffs have
3 reasons why they should be taken other than here in this
4 District all those reasons should be put on the table for the
5 defendants so that they can take them into consideration.

6 Likewise, any reason that the defendants believe
7 that the depositions ought to for any of the individual
8 witnesses ought to take place here, they ought to put all of
9 that on the table because what's going to happen is this.
10 You're going to -- with respect to each of these seven experts
11 you're going to put your cards on the table and when you've
12 done that if you're not able to change the other side's mind
13 you'll present to me only the arguments that you presented to
14 the other side. No new arguments and based upon that I will
15 dictate where the depositions ought to take place.

16 I understand that some of the considerations may
17 have to do with timing. If those are the issues you present
18 those issues to me also.

19 MR. HILL: Your Honor, I think we're there. I think
20 we had this conversation on Friday and we know where we
21 disagree. We disagree about whether the defendants are
22 allowed or permitted or entitled to take the depositions
23 before the defendant's reports. The plaintiff's position is
24 we should not take any depositions until after the rebuttal
25 reports, and with respect to the venue I believe we have

1 exchanged the very sort of information Your Honor has
2 outlined. The plaintiffs have represented to me that Dr.
3 Friedman has patients scheduled for many months and that Mr.
4 Kaufman is a busy lawyer. That's the information I've got.

5 MR. TOLCHIN: Your Honor, the issue that -- this is
6 Bob Tolchin. The issue that Mr. Hill just alluded to actually
7 could wind up changing people's respective positions. Just to
8 clarify --

9 THE COURT: What issue?

10 MR. TOLCHIN: The issue of the timing of the
11 depositions. Just to say it succinctly, the plaintiffs
12 believe that the depositions of the experts should take place
13 after all expert reports are done, meaning plaintiff's
14 reports, defendant's reports and any rebuttal reports
15 exchanged and then depose the experts. The defendants on the
16 other hand want to depose the plaintiff's experts before they
17 have to serve their reports and then they potentially want to
18 depose the experts again after they receive rebuttal reports.

19 Now, the reason that I say that clarifying this
20 point might change things is we anticipate -- we expect that
21 at least some of the defendant's experts will also be in
22 Israel and if we are going to depose all the experts after the
23 reports, in other words all the experts closer to the end,
24 then we will be deposing their experts in Israel. We're not
25 planning to make the experts come here. We will go there. So

1 if we would be going there to depose the defendant's experts
2 it would be very -- it would be much more efficient and
3 expedient to use the same trip to depose the plaintiff's
4 experts who are in Israel.

5 The other thing -- so that's one issue that's sort
6 of a threshold issue that might change people's minds. The
7 other issue that might change people's minds is the issue of
8 travel costs. Mr. Hill told me that he doesn't believe that
9 the defendant has to pay the travel costs for the experts to
10 travel to New York for their depositions. As I understand the
11 rule, the defendant has to pay the experts for their time and
12 for their cost of coming.

13 Now, I believe that part of Mr. Hill's insistence
14 that the experts come to New York is based on his belief that
15 that would be on our dime and not on the defendant's dime. I
16 think if it would be clarified, if the Court would rule that
17 the defendant has to pay that Mr. Hill may well change his
18 mind because he did tell me that he was interested in saving
19 his clients money.

20 MR. HILL: Your Honor, I'm not sure if you want me to
21 respond to that or not. I'm happy to if you'd like.

22 THE COURT: Is this one of the issues that divided
23 the parties as to who's going to pay what costs for travel?

24 MR. HILL: I would think it would not be appropriate
25 to require the defendants who did not choose to be in New York

1 and in fact have resisted being there on a claim that there's
2 no personal jurisdiction over them -- I recognize that Judge
3 Daniels has disagreed with that claim. It would be unfair to
4 require them having being haled into court in New York to pay
5 for the experts that the plaintiffs chose from overseas to
6 travel to the forum to be deposed. I think it's the same
7 issue as it was with the plaintiffs themselves when you
8 required them to come to New York to be deposed because they
9 had chosen the forum and the plaintiffs bore those expenses
10 themselves.

11 It wouldn't be appropriate to charge the defendant
12 for the plaintiff's decision to choose a foreign expert as
13 opposed to hiring a New York expert to do this work.

14 THE COURT: Do you have some authority for your
15 position?

16 MR. HILL: I do, Your Honor, and I apologize I don't
17 have the citation with me but I could email it to your clerk
18 very quickly after we get off the phone or perhaps I'll have
19 my associate run and get it right now.

20 THE COURT: When I say authority, I under -- I know
21 that sometimes people quote, on both sides quote my cases to
22 me but I know of cases in which this is -- in which it's been
23 ordered both ways.

24 MR. HILL: It is clearly within the Court's
25 discretion. I don't disagree with that.

1 THE COURT: Indeed I -- this is why I have to make
2 clear to the parties that you may not have put all of the
3 considerations before me. For example, I know of situations
4 where there have been experts who have been required to -- who
5 have been brought here from the west coast or from Kansas City
6 and it costs more than bringing them from Europe but the
7 Court -- do you understand what I'm saying?

8 MR. HILL: Yes, Your Honor. I don't happen to know
9 what the cost of the airfare from Tel Aviv is but it's -- I
10 don't know that it's substantially less than coming from
11 California.

12 THE COURT: The counterbalance of that is I still
13 don't have a sense of what that would require in terms of the
14 attorneys in terms of them traveling.

15 MR. HILL: Well, Your Honor, just to go with the
16 facts that we have out there so far, we're talking about eight
17 experts. I know the plaintiffs are not going to depositions
18 on a Saturday no matter where we are. So that means we're
19 going to be in the Middle East for at least a week and over a
20 weekend if we were to do all these depositions over there. So
21 the notion that it's going to be a short efficient trip to go
22 over there and do everyone I don't think that's the case at
23 all. I think we'd be talking several weeks, at least two
24 weeks just to do these eight witnesses that we're talking
25 about and it would be a big expense to our clients to have to

1 send us there, keep us over there, have us stay over the
2 weekend and it would be more efficient and less expensive for
3 everyone frankly to have the witnesses come to the states and
4 to be deposed because then counsel would not have to travel or
5 we'd only be traveling from [inaudible] New York which is a
6 much shorter and less expensive trip than [inaudible].

7 MR. TOLCHIN: It's hardly the case, Your Honor.

8 MS. WEISER: [Inaudible]

9 MR. TOLCHIN: Go ahead, Rachel.

10 THE COURT: Hello?

11 MS. WEISER: If I may. Your Honor, may I respond?

12 THE COURT: Go ahead.

13 MS. WEISER: First of all, the notion that the fact
14 that the plaintiffs filed suit in New York and therefore the
15 experts have to come to New York is frankly contrary to policy
16 and practice that has been going in courts for years now. We
17 live in a very global world. I was involved in a lot of
18 malpractice years ago. Judge, never do experts come to the
19 lawyers. Lawyers always go to the experts. Absolutely common
20 practice. So it would be actually against the norm to require
21 the experts to come.

22 Second of all, clearly [inaudible] lawyers would
23 still have to travel. I mean the fact that we have counsel in
24 New York doesn't mean that we don't have lawyers in Israel who
25 also are intimately involved in these cases and working with

1 the experts. So even way lawyers are going to have to travel.
2 The expense of having the experts travel versus the lawyers is
3 enormous because we're talking about -- all of the lawyers can
4 be in one place and all of the witnesses one after another in
5 a week or two. But if we have to require the experts to go to
6 New York we're talking about disrupting their lives for four
7 or five days. They have to fly. They have to get there on
8 time, get over jet lag. Be prepared to be deposed. They
9 can't leave that day because we don't know what time the
10 deposition is going to end. So they have to leave the next
11 day. So it's at least a four or five day process for the
12 experts, disruption in their life and their practices.

13 THE COURT: Let me -- Ms. Weiser, let me interrupt
14 you because --

15 MS. WEISER: Sure.

16 THE COURT: -- I'm not sure if counsel is getting my
17 message here. Each -- I've had three lawyers weigh in and
18 tell me stuff that I've heard for the last 15 or 20 years. I
19 understand that there are multiple things that can come into
20 play. I understand that there are practices, there are
21 policies, but when it comes right down to it these are
22 individual determinations that need -- I need to know the
23 factors in this case. If you cannot agree then all the things
24 that counsel have been saying you present them to me. I
25 understand the disruptions. I understand -- I think it should

1 be fairly clear that for some experts having the experts come
2 here creates more problems in terms of the disruptions of
3 their practices, their patient's practices, the travel could
4 be complicated, who pays what. There are a number of issues.
5 I understand that there are lots of issues but I still don't
6 know how they apply in this case. That's what I want the
7 parties to be telling me, why -- it may be that the plaintiffs
8 will take the position that we have seven experts in Israel
9 and if you put them all together we can do them all in a week.

10 I don't know but I want the parties to be clear on
11 is this. You tell me what it is that you want me to weigh.
12 You'll be on the record. I will make a determination. If you
13 disagree with it there will be enough on the record so that
14 everyone will know what I took into account and what you put
15 on the table. I don't want anybody to have me make a ruling
16 and then say well, you didn't consider X and we didn't get an
17 opportunity to say that. I'm giving you the full and fair
18 opportunity to tell me why the deposition should take place in
19 any place.

20 MR. HILL: Your Honor, this is Brian Hill.

21 THE COURT: Did I lose somebody?

22 MR. HILL: Your Honor, this is Brian Hill. How do yo
23 want us to convey that information to you? Would you like a
24 letter from each side or -- what would you like us to do?

25 THE COURT: What I would prefer is one letter in

1 which you talked about -- in this case I understand why it
2 might be -- you might have a global answer and then you might
3 have individual answers. But for each of these witnesses,
4 each of these experts I want to know the pros and cons for
5 each side in one letter why they should be deposed either in
6 New York or in Israel.

7 MR. HILL: Would Your Honor like to set a schedule
8 for those letters and do you have a preference as to who goes
9 first?

10 THE COURT: I would like one letter.

11 MR. HILL: You would like a letter to be joint of the
12 parties positions. I understand.

13 MR. TOLCHIN: Does Your Honor mean a joint letter?

14 THE COURT: Yes.

15 MR. TOLCHIN: In other words, this is plaintiff's
16 position and this is defendant's position?:

17 THE COURT: That is correct.

18 MR. HILL: We're happy to provide that to Your Honor.
19 Could we get a date? We'll get it done.

20 THE COURT: You're sure you can do that. Mr. Hill
21 represented that most of this was already on the table.

22 MR. HILL: I believe it's all been discussed
23 previously, Your Honor, so I'd like to get it done if not by
24 Friday, early next week so that we can move forward on this
25 issue.

1 THE COURT: I think --

2 MR. TOLCHIN: I think realistically it should be a
3 date next week. It's already getting late on Wednesday.

4 THE COURT: I understand that -- and frankly I share
5 the sentiment that we should do this as quickly as possible
6 although realistically I'm going to set the date for Tuesday.

7 MR. TOLCHIN: Understood, Your Honor.

8 THE COURT: After the timing issue I'd like to fold
9 that in with this issue because I agree with Mr. Tolchin in
10 that respect that to some extent the answer to how one or
11 where one does the depositions is [inaudible] by when you do
12 the depositions. But I think Mr. Hill is also right that
13 knowing how lawyers generally do expert depositions I don't
14 know that you will be able to complete even seven experts in
15 one week.

16 MR. HILL: Okay, Your Honor. We'll submit those
17 issues to you in a joint letter by Tuesday.

18 THE COURT: Okay.

19 MS. WEISER: Your Honor, one quick question. I
20 understand you want us to include the issue of where the
21 depositions are taking place and also the issue of timing.
22 Did you also want the issue of who covers what expense or is
23 that something that will be dealt with after?

24 THE COURT: Include that also because also understand
25 that who covers the expense while I know each side has weighed

1 in on that that still falls into the category of discretion.
2 There may -- in many cases it's done one way because the
3 parties have agreed to do it that way. These issues often
4 don't come up in situations in which I have two equal parties
5 on either side because they want to -- they decide to bear
6 their own expenses and it works out. It usually only comes up
7 in which one party is claiming that they don't have the
8 ability to pay but if you want to -- if you have views on that
9 by all means add that in.

10 MR. HILL: Your Honor, I don't know if you've covered
11 all the items on your agenda but [inaudible - breaking up].

12 THE COURT: The telephone made that almost
13 unintelligible.

14 MR. HILL: I beg your pardon, Your Honor. Your
15 Honor --

16 THE COURT: It's not your fault. Your echo was over
17 your words.

18 MR. HILL: I don't know if you've addressed all the
19 items on your agenda but as the person who has reports due
20 tomorrow I would prefer to get some guidance on where we are
21 on the schedule and whether the deadlines are going to move
22 and if so what my new deadlines will be.

23 THE COURT: The deadlines are definitely going to
24 move. As to what your deadlines are, I will -- you should
25 anticipate that you will get one week after I decide this

1 issue.

2 MR. HILL: So, Your Honor, let me just be clear about
3 where I'm coming from. You have directed the plaintiffs today
4 to produce supplemental or new reports for some of their
5 experts. You have directed them today to produce materials
6 cited in footnotes that we've been unable to locate. It's my
7 position that I shouldn't be required to tender my expert
8 reports until a reasonable period of time after we in fact get
9 the material that you have held today as required by Rule 26.

10 So I guess what I would propose is that we get a
11 deadline for the plaintiffs to provide these cures or
12 supplementations or whatever the right phrase is to bring
13 their reports into compliance with Rule 26 and then my reports
14 be due at a reasonable date after that, let us call it the
15 third --

16 THE COURT: Well, why don't we do this? Since I've
17 just made the rulings and you're going to be reporting to me
18 on Tuesday, Ms. Weiser and Mr. Tolchin, I expect that what --
19 one thing that you'll do is is that you will find out how long
20 it will -- or give some estimate with your experts how long
21 it's going to take for them to have compliance with the
22 orders. Let me know about that and hopefully that means I'll
23 be able to rule on this issue that Mr. Hill has brought up at
24 the same time. Frankly I don't see the efficacy of making a
25 deadline that I don't know the difficulties of complying with

1 because it's just going to create another issue.

2 MR. HILL: So, Your Honor, just for my purposes and
3 for the purposes of my experts, at this point my existing
4 deadlines for reports are adjourned sine die. Is that
5 accurate?

6 THE COURT: I guess sine die would be the correct
7 term, yes.

8 MR. HILL: Thank you, Your Honor. I have only one
9 other item I just wanted to alert the Court to. During our
10 last call we had a discussion about the deposition of Varda
11 Gueda [Ph.]. We have now agreed that that's going to take
12 place on May 7th in New York at eleven a.m. I just wanted to
13 inquire of whether the Court would be in the office that day
14 in case we needed to reach you telephonically for issues that
15 may arise in that deposition.

16 THE COURT: What day of the week is that?

17 MR. HILL: That is -- I don't have my calendar open.
18 I believe it is a Wednesday or perhaps a Tuesday.

19 THE COURT: May 8th is a Wednesday.

20 MR. HILL: Tuesday, May 7th beginning at eleven a.m.

21 THE COURT: If your question is whether or not we'll
22 be in chambers as opposed to in court?

23 MR. HILL: Yes, Your Honor. Or if there's a
24 particular time that day if we need to call you.

25 THE COURT: Well, typically we'd be in court except

1 during the lunch hour. So I don't if I could tell you any
2 particular time that would be good but you're usually able to
3 reach somebody in my chambers but typically we'd be in court
4 during the day almost -- sometimes depending on how the
5 afternoon session goes we might go to six or 6:30.

6 MR. HILL: We will obviously only call if we have
7 need. I just wanted to confirm that you were potentially
8 available if we needed you.

9 THE COURT: We'll be around. So, Mr. Tolchin, Ms.
10 Weiser, I understand that what I expect is that you will get
11 back to me once you've conferred with your experts about the
12 compliance and how long it would take and if it's just a
13 matter to pulling together, for example, things that they
14 already have maybe it's a short amount of time. I don't know
15 but I want you to give me some information so I don't --

16 MR. TOLCHIN: My gut tells me, Your Honor, that the
17 bulk of it is going to be in short order but there's going to
18 be some lingering particular items that are more challenging.

19 THE COURT: Well, at least if I know what is produced
20 and what remains I can make a determination of how I want to
21 handle it with respect to Mr. Hill. I understand Mr. Hill's
22 concern but I do want to make sure that we're not held hostage
23 to something which might be very difficult to complete and
24 might not require the holding up of the other reports. But
25 I'd like to see what it is that we were dealing with before I

1 make that determination.

2 If there's nothing further I'm looking forward to
3 seeing what you produce.

4 MR. HILL: Thank you, Your Honor.

5 MR. TOLCHIN: Thank you very much, Your Honor.

6 THE COURT: We're adjourned. Thank you.

7 MS. WEISER: Thank you.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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6 Shari Riemer

7 Dated: July 24, 2013

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